

## COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC 20515

June 28, 2016

The Honorable Jacob Lew  
United States Treasury Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Ave., N.W.  
Washington, D.C. 20220

Re: Proposed Regulations under Section 385 (Reg.-108060-15)

Dear Secretary Lew:

We write to express our grave concerns over the potential impact of the proposed debt-equity regulations under Internal Revenue Code (IRC) section 385 (the “proposed regulations”), released by the Treasury Department on April 4, 2016. In fact, the recent letter sent to you dated June 22, 2016 from our Democrat colleagues on the Ways and Means Committee shows that the substantial concerns over these proposed regulations are shared on a bipartisan basis. Furthermore, we believe any finalization of the proposed regulations in present form will have a profound and detrimental impact on business operations nationwide. If not significantly altered, they will undoubtedly reduce overall investment and economic activity to the detriment of the United States and its business community.

Since the release of these proposed 385 regulations, strong concerns have been raised with our offices by constituent companies and business groups representing every economic sector and industry in the United States. Because of the broad impact and disruptive effects of the proposed regulations, a group of business associations representing thousands of companies operating in the United States sent a letter to Treasury on May 12 urging Treasury to, at a minimum, change the retroactive effective date of the debt-equity recharacterization rules to be prospective, extend the public comment period deadline for at least 90 days, and thoroughly review and analyze the public comments rather than rushing to finalize the proposed regulations.

The question of whether an instrument is debt or equity has significant consequences to businesses’ financial planning and operations. Furthermore, the proposed regulations represent a dramatic departure from current policy and practice, overturning more than a half century of well-established jurisprudence based upon analysis of an instrument’s actual substance. Despite the assertions by Treasury that these regulations are designed “to further reduce the benefits of and limit the number of corporate tax inversions, including by addressing earnings stripping,” the proposed regulations are broadly applicable to a wide array of ordinary business transactions, creating unacceptably high levels of uncertainty and adverse collateral consequences for non-tax motivated business activity.


In that same vein, we were surprised at the Treasury's ultimate decision to use section 385 for the purported purpose of addressing corporate inversions and earnings stripping activities. As you are well aware, Congress has provided the Treasury and Internal Revenue Service (IRS) tools within the IRC that provide clear pathways to address these activities. To be clear, Congress did not intend section 385 to serve the purpose for which it is presently being used in policing inversion or earnings stripping activities, and we respectfully remind the Treasury that they have co-opted section 385 to use for purposes other than what Congress intended. We stand ready to work with the Treasury, observing the appropriate channel of amending the IRC specifically through the legislative process, in any way that will improve the competitiveness of the United States as a place to conduct and locate business operations.


Furthermore, the decision to include a retroactive effective date of April 4, 2016 for the recharacterization rules forces companies to not only contemplate the impact of these massive changes on future business operations, but also on transactions that are presently underway, and all before knowing what the substance of the final rules will be. The potential risk for many companies to current financial operations has resulted in freezing transactions that have the potential to be "recast" following finalization of the proposed regulations. In some cases, this has already begun to cause reductions in the repatriation of funds that would normally be used for domestic investment or payment of dividends. We believe this retroactive effective date is inappropriate and should be changed to apply, at the earliest, to debt instruments issued on or after the date that is no sooner than 90 days after the regulations are finalized.

Given the magnitude of these proposed changes, and the severe and negative impact they could have on the normal course of business for U.S. companies, we strongly urge Treasury to extend the public comment period for the proposed regulations until at least October 5, 2016 to allow businesses an adequate opportunity to evaluate their impact and present solutions to the many problems they create. Should the Treasury insist upon finalizing these proposed regulations, at a minimum, we believe the Treasury should withdraw any provisions currently included within the proposed regulations that would significantly impact capital structuring and ordinary business transactions/operations.

Finally, as a result of our deep concern over the severe impacts these proposed regulations could have on both domestic and global business operations that are critical to the U.S. economy, we respectfully request that Treasury conduct a thorough economic analysis of the proposed regulations to ensure Members of Congress have the ability to assess their effects.

Sincerely,

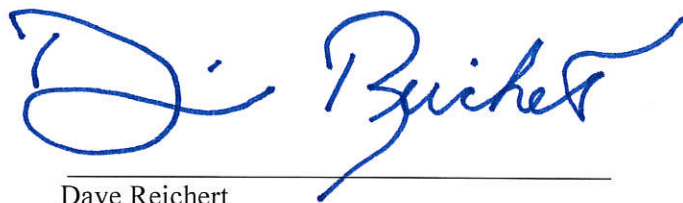
  
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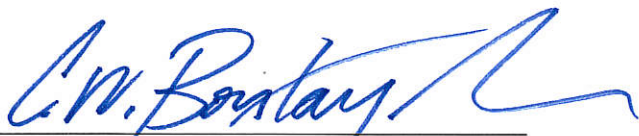
  
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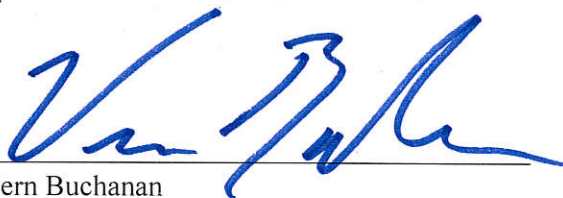
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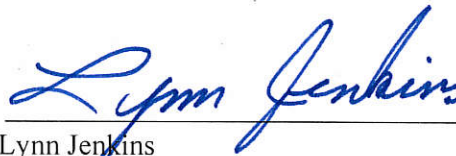
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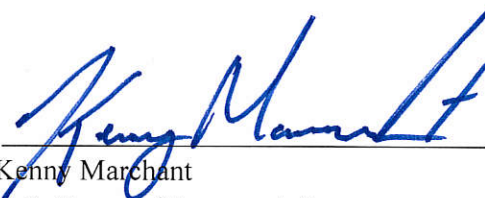
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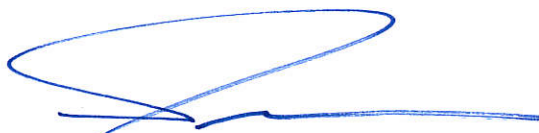
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